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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHARLES A. MILLER

Appeal 2010-001123
Application 10/680,364
Technology Center 3600

Before CHARLES N. GREENHUT, MICHAEL C. ASTORINO and
MICHAEL L. HOELTER, *Administrative Patent Judges*.

HOELTER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is a decision on appeal, under 35 U.S.C. § 134(a), from a final rejection of claims 1-3, 6-29, 32-47, 50-60 and 62-84. Claims 4, 5, 30, 31, 48, 49 and 61 are canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

The Claimed Subject Matter

The claimed subject matter pertains to a carton having tear lines for gaining access to the carton's contents. Independent claim 1 is illustrative of the invention and is reproduced below:

1. A carton for containing a plurality of articles comprising:
 - a plurality of walls including a bottom wall spaced from a top wall, a pair of spaced side walls and a pair of spaced end walls, the side and end walls extending between the top and bottom walls;
 - a plurality of flaps extending from at least some of the walls, the end walls being formed by combinations of the flaps;
 - a corner of the carton formed by one of the end walls and either the top wall or the bottom wall;
 - a dispenser portion for dispensing articles from the carton, the dispenser portion of the carton being defined by at least one tear line formed in more than one of the flaps and at least in part from the corner to define a dispenser opening for exposing an article for removal from the carton; and
 - a finger hole for grasping the dispenser portion, the finger hole being located opposite from the corner and at least in part in the bottom wall,
- wherein the dispenser portion does not include either of the side walls and the flap extending from the bottom wall is at least one of the flaps through which the tear line is formed.

References Relied on by the Examiner

Wood

US 4,558,816

Dec. 17, 1985

Brintazzoli
Sylvie

US 5,348,219
FR 2761342

Sep. 20, 1994
Oct. 2, 1998

The Rejections on Appeal

1. Claims 1-3, 6-11, 14, 15, 17-29, 32, 33, 35-39, 43-47, 51, 53-59, 63-67, 70, 71, 73, 74 and 76-84 are rejected under 35 U.S.C. § 102(b) as being anticipated by Sylvie (Ans. 4).
2. Claims 12, 40, 50, 60 and 72 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie and Wood (Ans. 4).
3. Claims 13 and 41 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie and Brintazzoli (Ans. 4).
4. Claims 16, 34, 42, 52, 62, 68, 69 and 75 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie (Ans. 4).

ISSUE

Does Sylvie anticipate a carton having at least one tear line in multiple end flaps that define a dispenser portion which, when torn, define a dispenser opening as set forth in claim 1?

Has the Examiner provided sufficient reasoning for the rejection of dependent claim 16 as being obvious over Sylvie?

ANALYSIS

Appellant argues claims 1-3, 6-11, 14, 15, 17-29, 32, 33, 35-39, 43-47, 51, 53-59, 63-67, 70, 71, 73, 74 and 76-84 together (App. Br. 15). We select claim 1 for review. Appellant also argues dependent claims 12, 40, 50, 60 and 72 together and dependent claims 13 and 41 together (App. Br. 19). We address these separate claim groupings below. Appellant further

argues dependent claims 16, 34, 42, 52, 62, 68, 69 and 75 together (App. Br. 20). We select claim 16 for review.

The rejection of claim 1 as anticipated by Sylvie

Independent claim 1 requires a carton whose end walls are formed by a combination of flaps and a “dispenser portion” that is “defined by at least one tear line formed in more than one of the flaps and at least in part from the corner to define a dispenser opening.” The Examiner relies on Sylvie as anticipating all the limitations of claim 1 stating that “the applicant has not distinguished how the structure of the Sylvie’s carton is structurally different as claimed in the applicant’s claimed limitations” (Ans. 4, 6). Appellant contends that the “disclosure of Sylvie is directed to an aspect that is far afield from what is recited in the independent claims and whose only connection with Applicant's invention appears to be that it involves a carton having a tear line” (App. Br. 15). Appellant further contends that Sylvie “has nothing to do with a dispenser to facilitate the dispensing of articles carried by a carton or package” (App. Br. 15).

It has long been settled that claims must be distinguished from the prior art in terms of structure rather than function (*In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997)). The patentability of a claim “depends on the claimed structure, not on the use or purpose of that structure” (*Catalina Marketing Int’l. Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 809 (Fed. Cir. 2002)). In view of these instructions, Appellant’s contentions that the function and purpose of Sylvie is different or that Sylvie “has nothing to do with a dispenser” or that “one of ordinary skill in this art would not view Sylvie as disclosing a dispenser” is not persuasive (App. Br. 15, 17-18, see also Reply Br. 3, 4- 6).

Appellant further contends that Sylvie lacks or does not disclose “a ‘dispenser’, ‘dispenser portion’, or ‘dispenser opening’ as is recited in the independent claims” (Reply Br. 2, 3-4, 5-6; see also App. Br. 17, 18). Appellant contends that the Examiner’s finding of these limitations in Sylvie, “completely ignores the true teachings of Sylvie” and that “Sylvie fails to disclose any such feature” because “the divisible portions in Sylvie are configured such that when they are removed from the carton, the carton falls apart” and is “totally inoperable as a dispenser” (App. Br. 17-18, see also Reply Br. 4-5).

The United States Patent & Trademark Office is tasked with interpreting claims as broadly as their terms reasonably allow (*In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989)). We have also been instructed that “absent contravening evidence from the specification or prosecution history, plain and unambiguous claim language controls the construction analysis” (*DSW, Inc. v. Shoe Pavilion, Inc.*, 537 F.3d 1342, 1347 (Fed. Cir. 2008)).

Of these three terms identified by Appellant, two are defined in claim 1 itself (Claim 1 states: “the *dispenser portion* of the carton being defined by at least one tear line formed in more than one of the flaps and at least in part from the corner to define a *dispenser opening*” (italics added)). Further, Appellant’s Specification does not provide an explicit definition for either “dispenser portion” or “dispenser opening.” Hence the plain and unambiguous language as set forth in claim 1 controls their construction. The third term identified by Appellant, i.e., “dispenser” does not appear alone in claim 1 but the term “dispensing” does appear in an intended use phrase in claim 1 (“a dispenser portion for *dispensing* articles from the carton”).

Regarding the two terms explicitly defined in claim 1, Appellant does not show how the limitations related to “a dispenser” define a carton structurally different from Sylvia’s carton. Instead Appellant addresses the functional difference between Appellant’s claim and Sylvie’s teachings (App. Br. 17-18). This is not persuasive. Appellant also contends that the Examiner’s interpretation of Sylvie “is not a reasonable interpretation” but Appellant fails to explain such unreasonableness other than in terms of “the function and purpose” of Sylvie (Reply Br. 2-6).

Regarding the intended use of the claim term “dispensing,” the Examiner states that “a recitation of the intended use of the claimed invention must result in a structural difference” (Ans. 6). Appellant has not cogently refuted the Examiner’s finding that if “the prior art structure is capable of performing the intended use, then it meets the claim” (Ans. 6). We are not persuaded by Appellant’s contentions.

Appellant further references *American Hoist & Derrick* for the proposition that “[a]nticipation requires the presence in a single prior art reference disclosure of each and every element of the claimed invention, arranged as in the claim” (App. Br. 17 citing *Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 1458 (Fed. Cir. 1984)). Appellant argues that “the scored lines in the carton of Sylvie are for the purpose of easily collapsing the carton back down to a relatively flat configuration” and not for dispensing articles (App. Br. 17). As stated *supra*, a difference in purpose alone is not persuasive. Further, Appellant has not persuaded us that Sylvie is not arranged as set forth in claim 1. We further note that a “reference does not fail as an anticipation merely because it does not contain a description of the subject matter of the appealed claim

in ipsissimis verbis” (*In re May*, 574 F.2d 1082, 1090 (CCPA 1978) (citing *In re Schaumann*, 572 F.2d 312, 317 (CCPA 1978)). Accordingly, we do not find fault with the Examiner’s statement that “the applicant has not distinguished how the structure of Sylvie’s carton is structurally different as claimed in applicant’s claimed limitations” (Ans. 6).

In view of the above and based on the record presented, we sustain the Examiner’s rejections of claims 1-3, 6-11, 14, 15, 17-29, 32, 33, 35-39, 43-47, 51, 53-59, 63-67, 70, 71, 73, 74 and 76-84 as being anticipated by Sylvie.

The rejection of dependent claims 12, 40, 50, 60 and 72 as obvious over Sylvie and Wood and the rejection of dependent claims 13 and 41 as obvious over Sylvie, Wood and Brintazzoli

For each of these claim groups, Appellant contends that each claim is dependent from one of the allowable independent claims and as such, Applicant need not address the Examiner’s reliance on Wood or Brintazzoli because neither “fails to cure the deficiency in the primary reference of Sylvie” (App. Br. 19). Appellant presents no further arguments and, as we find no deficiency in the Examiner’s reliance on Sylvie, we sustain the Examiner’s rejection of claims 12, 13, 40, 41, 50, 60 and 72.

The rejection of dependent claim 16

Dependent claim 16 further requires that “each tear line extends along a juncture between the top wall and one of the side walls.” Appellant contends that “the Examiner has provided no rationale or support” for the assertion that “one of ordinary skill would position the tear line as in the rejected claims” (App. Br. 20 referencing Final Office Action 6-7). The Examiner’s stated rationale or support is that making the tear lines extend along such a juncture is “because the dispenser portion size would be larger

thus, making removable of article easier (sic.)” (Final Office Action 7). Appellant has not shown how the Examiner’s rationale is unreasonable nor is Appellant’s contention that “the Examiner has provided no rationale or support” persuasive. Appellant presents no further arguments except that claim 16 depends from an allowable claim and should be allowed for the reasons previously stated (App. Br. 20). Based on the record presented, we sustain the Examiner’s rejection of claims 16, 34, 42, 52, 62, 68, 69 and 75.

CONCLUSION

Sylvie does anticipate a carton having at least one tear line in multiple end flaps that define a dispenser portion which, when torn, define a dispenser opening as set forth in claim 1.

The Examiner has provided sufficient reasoning for the rejection of dependent claim 16 as being obvious over Sylvie.

DECISION

The rejection of claims 1-3, 6-29, 32-47, 50-60 and 62-84 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

MP